United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4099 75-4126

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Docket No. 75-4099

AMERICAN CAN COMPANY,
Petitioner,

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Intervenor,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Docket No. 75-4126

LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Petitioner,

against

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Intervenor.

BRIEF ON BEHALF OF PETITIONER AMERICAN CAN COMPANY

SIMPSON THACHER & BARTLETT
Attorneys for Petitioner
American Can Company
Office and P. O. Address
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

ALBERT X. BADER, JR.
MARTIN H. ZUCKERMAN
JAMES S. FRANK,
Of Counsel.

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Preliminary Statement

The Order here appealed from was entered by the National Labor Relations Board ("Board") on May 30, 1975 in cases numbered 22-CA-5619, 22-CA-5803 and 22-RC-5853 (official citation 218 NLRB No. 17). It found that

American Can Company violated Sections 8(a)(1), (2) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 150 et. seq., ("Act"), but that it did not violate Section 8(a) (5) of the Act. This initial brief and American Can Company's petition for review, is addressed to so much of the Board's order as found that American Can violated sections 8(a)(1), 8(a)(2) and 8(a)(3) of the Act. In the companion case, not discussed in this brief, Local One, Amalgamated Lithographers of America, International Typographical Union, AFL-CIO ("ALA") attacks so much of the order as found no violation of Section 8(a)(5) of the Act.

Issues Presented

The fundamental issue presented by this Petition for review is whether the Board was correct in its determination and is there substantial evidence on the record to support its determination that American Can Company unlawfully assisted the United Steelworkers of America, AFL-CIO ("Steelworkers") within the meaning of Section 8(a) (2) of the Act by entering into a collective bargaining agreement with the Steelworkers for its Regency Plant which covered lithographic production employees on the basis of a certification for a unit consisting of ". . . all production and maintenance employees" issued to the Steelworkers by the Board.

There are subsidiary questions which essentially turn on the resolution of the first question, specifically:

> (a) Was the Board correct in its determination and is there substantial evidence on the record to support the Board's determination that American Can Company violated Sections 8(a) (1) and (3) of the Act by conditioning the employment of lithographers on the requirement that they adhere to the collective bargaining agreement, including the

union security clause, between American Can Company and the Steelworkers?

(b) Was the Board correct in its determination to amend the Certification of Representative issued to the Steelworkers at the American Can Company Regency Plant, to exclude lithographers?

So far as we are aware, there is no serious debate that all the charges sustained by the Board hinge on the alleged Section 8(a)(2) violation. If this Court sustains that charge, it should sustain the Board's order and grant its cross-petition for enforcement. If that charge falls, the Section 8(a)(1) and 8(a)(3) charges lose their predicate and must fall, as must the Board's amendments of its certification.

Prior Proceedings

This case, tried before an Administrative Law Judge on May 29, 30 and 31, 1974, arose out of unfair labor practice charges filed by the ALA against the American Can Company ("American Can" or "Company") on September 2, 1973, as to Sections 8(a)(1), (2) and (3) of the Act, and on March 5, 1974, as to Section 8(a)(5) of the Act,* all

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* Title 29 U.S.C. Section 158,

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a).

attacking an election held by the Board on September 21, 1973, as a result of which it certified Steelworkers as the bargaining agent of production and maintenance employees at the Company's Regency Plant and actions taken by the Company on the basis of that election.

On October 23, 1974, the Administrative Law Judge issued his decision recommending that the complaint be dismissed in its entirety. Thereafter, Counsel for the General Counsel and the ALA filed exceptions to his decision.*

On May 30, 1975 the Board issued its decision and Order sustaining the Judge's decision that American Can did not violate Section 8(a)(5) of the Act, but finding that it had violated Sections 8(a)(1), (2) and (3) of the Act; the Board further, again contrary to the Administrative Law Judge's recommendation, amended the certification previously issued to the Steelworkers so as to exclude lithographic production workers.

Statement of Facts

American Can is a major manufacturer of metal cans with can-making facilities at various locations in the United States and Canada. Among others, the Company operated a can-making facility in Jersey City, New Jersey (the "Hudson plant"). The Hudson plant employees were represented by five labor organizations: The Steelworkers, which represented the bulk of production and maintenance workers; the International Brotherhood of Teamsters, which represented truck drivers; the Office and Professional Employees International Union, which represented clerical workers; the Operating Engineers, which represented en-

* American Can also filed an exception to the Judge's decision which went to his failure to dismiss the allegations of violations of Section 8(a) (5) of the Act as being time barred by Section 10(b) of the Act. 29 U.S.C. § 160(b).

gineers; and the ALA, which represented lithographic production employees.* (Tr., 287a-290a; ALJD, 18a[7-15])**

On August 8, 1972, Larry Marifjeren, Plant Manager of the Hudson plant, issued a notice to all Hudson employees that American Can planned to shut down nine can-making facilities, including the Hudson plant (Tr., 45a), and to sell three pulp and paper facilities within the next year and a half. The Hudson plant comprised eight buildings, and had over 1,100,000 square feet of space (Tr., 205a-206a) and in 1973 employed 1800 persons (Tr., 212a). It produced all sizes and styles of metal containers, including coffee containers, shortening containers, beer, carbonated beverages, motor oil containers, metal and composite, aerosol containers, drums, and film boxes (Tr., 207a; ALJD, 18a[7]; ALJD, 22a[33]).

On December 20, 1972, Marifjeren made another general announcement that American Can was going to open a new can-making facility—employing about 250 employees —in Edison Township, New Jersey (the "Regency plant", sometimes referred to in testimony as the Edison plant),

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* While the Hudson plant employees were represented by five different unions, the Board has certified a single union to represent all employees at eight other American Can plants; The International Association of Machinists represent all production and maintenance employees including lithographers at the Atlanta plant, Fairport N.Y. plant and the Needham Mass. plant. The Steelworkers have been certified by the Board for all inclusive units at the Morrisville Penn. plant, Tampa Florida plant, Indianapolis Indiana plant, Hammond Indiana plant, and the Puerto Rico plant. At the Los Angeles California plant and at the Oakland California plant, the Company has recognized the Steelworkers in all inclusive unit on the basis of a card check (Tr., 259a).

** References to the record below are denoted by their source, the Joint Appendix page number is referenced as "—a" and line designations are referenced as "[—]" where appropriate. Thus, the official transcript is noted as (Tr., —a); the decision of the Board is noted as (Bd. Dec., —a); the decision of the Administrative Law Judge is noted as (ALJD, —a[—]); exhibits of the General Counsel are noted as (GC—, —a); Company exhibits are noted as (Co. Ex. —, —a) and Steelworker exhibits are noted as (S. Ex. —, —a).

about 26 miles from the Hudson plant (ALJD, 18a[22]).* The announcement stated that those employees who wanted to be considered for employment at the new plant should immediately make an application by signing a list in the employee relations department (GC 10, 340a). Three hundred and thirteen employees signed the list between December 20, 1972 and September 12, 1973 (Co. Ex. 2; ALJD, 18a[27]).

On January 16, 1973, one month after the announcement of the contemplated opening of the new plant, the ALA representative, Edward Hansen, contacted William Leser, a Company representative; he asked Leser "whether the Company was considering applying the [existing] ALA contract to the Edison plant, but Leser told him it [the Regency plant] would be a new plant, that the Company hoped it would not be organized . . ." (ALJD, 18a[38]). On January 19, 1973, Hansen sent to American Can ALA's first written communication with regard to the Edison facility. In the letter, Hansen stated that ALA members employed at Hudson "have signified to us their *desire* to work at the Regency plant and to continue to be represented by us. . . ." (Emphasis supplied; GC 3, 331a; ALJD, 18a[45]). Hansen assigned Allen Olmstead, Director of Organizing and Financial Secretary, to be in contact with the ALA shop steward and to alert the ALA's attorney to what was happening (Tr., 103a). On January 30, 1973, the Company answered Hansen reasserting the Company's position that Regency was an entirely new operation (GC 4, 332a; ALJD, 19a[16]), i.e., not covered by any existing union recognition.

On March 7, 1973, over a month after receipt of the Company's letter, Hansen replied, restating the ALA's contention that "nothing more was involved than the trans-

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* Regency makes only one type of can line—aerosol. The production of the other types of containers formerly produced at the Hudson plant was transferred to other American Can plants (Tr., 207a), along with some of the necessary production equipment (Tr., 260a) and supervisory personnel (Co. Ex. 7, 353a).

fer of existing lithographic operations and skills already employed at Hudson to another plant; and . . . that ALA expected the Company to take to the new plant as many of the Hudson lithographic employees as wished to go, and that it would continue to represent such a unit there. Finally, Hansen said he expected to negotiate a new contract to replace the one expiring May 1, 1973 (covering Hudson, Hillside and Hoboken)." (ALJD, 19a[23]; GC 5, 333a)

"Cooper [the Company's counsel] immediately responded on March 9 to this effect: (1) The Company has no duty to bargain with ALA as to closing the Hudson plant or opening the new plant; (2) that it had satisfied, for the period of their present agreement, any duty it might have to bargain over the effects of closing Hudson on the lithographic employees, but would bargain for a new agreement covering Hudson; (3) that ALA had not established any right to represent employees of the new Regency plant at Edison, which was not yet opened; and (4) that the Company would consider for employment at Regency all applicants on a non-discriminatory basis, but would not automatically hire for the new plant every lithographic employee at Hudson who wished to transfer." (ALJD, 19a[36]; GC 6, 335a)

On April 11, 1973 Hansen met with Leser to negotiate a new collective bargaining agreement for Hudson and several other plants to replace the one about to expire (Tr., 101a; ALJD, 19a[48]). At no time during the bargaining sessions did ALA ask that Hudson ALA employees be transferred to Regency, or that the Company negotiate the effects of the Hudson shutdown upon ALA employees (Tr.,102a, 108a, 290a; 5 ALJD, 20a[3]). On April 11, 1973, the Company reached agreement with the ALA covering the Hudson, Hillside and Hoboken plants (ALJD, 19a[50]; GC 7, 336a).

After these negotiations, Hansen asked to meet with John Buly, the Company's Employee Relations Director.

The meeting took place over lunch on May 14, 1973 and lasted approximately one and a half hours. During the meeting, Hansen, Buly and Leser spoke about various problems confronting the canning industry, and, for about five minutes, about the Regency plant. Hansen stated that "if the ALA represented the lithographers" they would help the Company work out its problems. Hansen was informed that the Company's position had not changed, that Regency was a new plant, and that no union had any rights at Regency at that time (Tr., 291a-292a; ALJD, 20a[12-19]). Hansen made no demands on the Company at that meeting.

From May 1973 until the ALA filed its initial unfair labor practice charges against the Company in September 1973, the ALA had no further contact with the Company officials.

The Steelworker Petition

In the Spring of 1973, the Company began tryout operations at Regency. Of 216 employees at the Hudson plant who were then offered jobs at Regency, 95 accepted (Tr., 183a; ALJD, 21a[4]).

On August 23, 1973, Steelworkers filed a Petition for Representation in a unit of "all production and maintenance employees, *including lithographers.*" (Emphasis supplied; GC 12, 342a; ALJD, 20a[11]). At that time there were approximately 85 employees, out of a projected complement of 225 (Tr., 258a; ALJD, 20a[1]), in 16 of the 26 contemplated job classifications (Tr., 258a; ALJD, 20a-[15]). Since under well established Board law this constituted a substantial and representative portion of the projected employee complement at Regency,* the Company

* The NLRB generally requires that in the case of a new plant, the employee complement at the time of an election must represent at least 30% of anticipated complement in 50% of job classifications. *General Extrusion Co., Inc.*, 121 NLRB 1165 (1958). Once that point is reached, an election will be ordered. See, *NLRB* v. *Clement-Blythe Co.*, 415 F.2d 78 (4th Cir. 1969); and *General Cable Corporation*, 173 NLRB 251 (1968).

and the Steelworkers, with the approval of the Regional Director, agreed to conduct an election in the production and maintenance unit. The Stipulation for Certification Upon Consent Election Agreement, among the representatives of the Board, the Steelworkers and the Company, set September 21, 1973 as the election date and described the unit as: "All hourly rated production and maintenance employees employed by the Employer at its Regency plant located on Pierson Avenue, Edison, New Jersey, but excluding office clerical employees, professional employees, confidential employees, managerial employees, watchmen, guards and supervisors as defined in the Act." (GC 13, 346a; ALJD, 21a[20])

The Board, in its decision, asserts that the term "including lithographers" which was part of the unit description in the Petition filed by the Steelworkers was omitted from the unit description in the stipulated election agreement "at the suggestion of a Board representative on the assurance of Respondent that no lithographic employees were then employed at the new plant." (Bd. Dec., 4a) This statement is utterly without support in the record. The Board's General Counsel never called any witness who testified to discussions with a Board agent concerning the definition of the unit or to any representations made to the Board agent concerning the employment picture at Regency. In fact, no one testified as to the events or discussions leading to the signing of the election agreement.

On September 20, 1973, the day before the election, the ALA had delivered to the NLRB Regional Office, a letter which stated:

> "Just learned of representation election scheduled for September 21st at American Can, Pierson Avenue, Edison, New Jersey. We object to any inclusion of lithographic workers in whom we have an interest and who do not properly belong in plant-wide unit." (GC 11A, 341a; ALJD, 21a[41])

ALA had in fact known of the pending election for at least 6 or 7 days (Tr, 272a; Bd. Dec., 4a).

After receipt of the ALA letter, a Board Agent called the Regency plant, spoke to a Mr. Ries, the plant's employee relations supervisor and asked him if he knew if the ALA had any interest in the election (Tr., 279a). Explaining that matters such as this one were handled by Company headquarters, Ries told the Board Agent that he personally knew of no interest, but suggested that she call the appropriate persons at the Company's headquarters in Greenwich, Connecticut (Tr., 279a-280a). There is no evidence that the Board Agent made any further effort to pursue this inquiry (Bd. Dec., 4a; ALJD, 22a-[14-16] and ALJD, 36a[36-40]).

The Board conducted the election on September 21, as scheduled, resulting in a victory for the Steelworkers, 84 to 0.

On September 28, 1973, the ALA filed charges with the Regional Office alleging that the Company had violated Sections 8(a) (1), (2) and (5) of the Act.* Even though the Regional Office then had in its possession both the ALA charges and ALA's prior request that the election not be conducted in the first place, on October 1, 1973, it certified the Steelworkers as the representative of all the production and maintenance employees at the Regency plant (GC 14, 348a).

The Company and the Steelworkers have a nationwide collective bargaining contract which provides that all new plants organized by the Steelworkers would be

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* ALA's theory then—and through the NLRB hearing—was that it was denied bargaining rights created by its contract with the Company for the Hudson plant employees. This was the Section 8(a) (5) theory of the ALA and Board Counsel that the Board, affirming the Administrative Law Judge, has dismissed.

automatically covered under the master agreement (Tr. 193a). After the Steelworkers were certified by the Board as the collective bargaining representative at Regency, on October 1, 1973, the master contract was applied to that plant (Tr., 184a). The contract contained provisions recognizing the Steelworkers as the collective bargaining agent of the employees and a "Union Shop" clause requiring all employees covered by the agreement to become members of the Steelworkers (S. Ex. 1, 356a). The Company did not hire pressmen at Regency until December 1973; actual press production on a try-out basis did not begin until February 1974 (Tr., 177a). The Company planned to hire 30 pressmen at Regency at full operation (Tr., 176a). Of the lithographers employed at the Old Hudson plant, 5 were considered to have excellent records and were interviewed and offered lithographic jobs at the new plant; they were told that if they accepted employment, they would be subject to the terms of the Steelworker's contract (Tr., 178a-179a). None accepted employment on these terms. Inasmuch as the Company was getting job applications from qualified pressmen from other sources, the Company did not expect to offer jobs to any other former Hudson plant lithographers (Tr., 182a).

ARGUMENT

POINT I

The Board Has Erroneously Applied And Extended The *Midwest Piping* Doctrine to A Situation Where The Employer Has Followed The Mandates of Section 8(d) After A Board Conducted Election.

Sections 7, 8 and 9 of the National Labor Relations Act, with certain well defined exceptions, deal with the rights of a majority of employees in an appropriate bargaining unit to designate a collective bargaining repre-

sentative of their own choosing. Representation rights of unions in this context are purely derivative—i.e., dependent upon the uncoerced will of a majority of the employees in a unit appropriate for collective bargaining. So far as substantive law is concerned, an employer may voluntarily recognize an obvious majority representative for such a unit. However, he must *not* recognize an entity that represents only a minority. *International Ladies' Garment Workers' Union* v. *NLRB,* 366 U.S. 731 (1961). If he is in doubt, he may await the outcome of a representation proceeding which the Board will conduct under Section 9 of the Act, on an appropriate petition—filed either by the employer or by a purported representative who has the support of at least 30% of the collective bargaining unit. *Linden Lumber Division* v. *NLRB,* 419 U.S. 301 (1974).

In the situation where two unions are actively competing to represent an employer's employees, the employer who recognizes one representative in preference to a second acts "at his peril"—i.e., if he recognizes one union, he commits an unfair labor practice unless that union has an uncoerced majority for he may not assist one union unilaterally when the issue is in doubt (the so-called *Midwest Piping* Doctrine.)*

To prevent any undue delay in recognition of the employees' rights to select a bargaining representative at an unorganized new facility—and at the same time to assure that the voting unit is a substantial and representative one, the Board in 1958 established its so-called *General Extrusion* doctrine,** which generally provides for and requires an election if a facility has employed 30% of the employee complement in 50% of the expected job classifications.

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* *Midwest Piping and Supply Co., Inc.,* 63 NLRB 1060 (1945).

** *General Extrusion Company, Inc.,* 121 NLRB 1165 (1958).

By its decision in this case, the Board is holding the Company guilty of unfair labor practice charges because (a) it obeyed a certification of representative properly issued by the Board's representative, and (b) pursuant to that certification, it has entered into an agreement with the certified agent for its employees which contains terms (viz. union recognition and union security) which are mandatory subjects for bargaining and which appear in all but a handful of major union contracts. The Board's decision and remedy could be justified, if at all, only on the basis that the certification was fraudulently obtained. The record is absolutely barren of any evidence on that score.

In order to fully analyze the Board's errors, it is necessary to review briefly the concept of improper employer interference with the organizing efforts of rival labor organizations, the *Midwest Piping* doctrine on which the Board expressly rests its decision here (Bd. Dec., 5a).

A. In *Midwest Piping* the Board held that an employer interferes with his employees' freedom of choice to select their own bargaining representative if, faced with two or more valid representation claims, he voluntarily grants recognition to one of the two competing unions.

Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization. An early application of this statutory language was made by the Board in *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945), where the employer, faced with valid representation petitions filed by two unions, granted voluntary recognition to one of the competing unions without the benefit of a card check or a Board conducted election. Since both of the unions had made demands for recognition which entitled them to an election under established Board procedures, the Board held that the employer's grant of

recognition to one of the unions interfered with the employees' freedom to select their own bargaining representative and that the employer's failure to remain neutral in those circumstances constituted a violation of Section 8(a)(2) of the Act.

While employer neutrality in the face of rival union campaigns was deemed necessary to protect employees' freedom of choice, the Board also recognized that the doctrine had the potential to frustrate the desires of a majority of the employer's employees. Thus, in *Ensher, Alexander & Barsoom, Inc.*, 74 NLRB 1443, 1445 (1947), the Board added the caveat that the *Midwest Piping* doctrine should be strictly construed and sparingly applied. See, *NLRB* v. *Swift & Co.*, 294 F.2d 285, 287 (3rd Cir., 1961).*

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* In this original context, the *Midwest Piping* doctrine has been approved by this Court on several occasions. *NLRB* v. *Hudson Berlind Corp.*, 494 F.2d 1200 (2d Cir.) *cert. denied* 419 U.S. 897 (1974) discussed *infra; NLRB* v. *Midtown Service Co.*, 425 F.2d 665 (2d Cir., 1970); *Welch Scientific Co.* v. *NLRB*, 340 F.2d 199 (2d Cir., 1965) and *NLRB* v. *National Container Corp.*, 211 F.2d 525 (2d Cir., 1954). In *Midtown Service* the employees filed for a decertification election to oust the incumbent union. The employer engaged in flagrant violative conduct to insure that the union retained its bargaining status. The employer signed a new contract with the union after the union lost the election. The fact that the election was set aside—due to the employer's refusal to issue the so-called *Excelsior list*—was not sufficient reason to dispel the doubt about the union's continuing majority status. In *Welch* the Company attempted to apply to the employees of a newly acquired New York company the terms of a collective bargaining contract negotiated for employees in Chicago at a time when another union sought to represent the New York employees and produced a proper showing of interest. The Company was not alleged to have committed a violation of Section 8(a)(2) by assisting the union, but was alleged to have violated Section 8(a)(1) by applying the substantive terms of the contract. In *National Container,* the Company executed a contract with a union which had won an NLRB election, but at a time when a rival union had filed objections to the election which were still pending. This Court held that because the objections were pending, a real question of representation existed when the contract was signed.

B. The Board's efforts to expand *Midwest Piping* have been consistently rejected by the Courts as interference with the representation rights of a majority of employees.

Despite its early recognition that *Midwest Piping* must be applied sparingly, the Board has attempted to extend its application to preclude the voluntary recognition of any union when another union has a claim which is not "clearly unsupportable and lacking in substance." * *See, e.g., Playskool, Inc.,* 195 NLRB 560 (1972) enforcement denied, 477 F.2d 66 (7th Cir., 1973).

This expended view of *Midwest Piping,* reasserted by the Board here as its primary basis of decision (Bd. Dec., 6a), has been uniformly rejected by the Courts of Appeal where an employer has recognized one of two competing unions on the basis of a clear demonstration of majority support. The reviewing Court in *Playskool Inc.* v. *NLRB,* 477 F.2d 66 (7th Cir., 1973), cogently summarized the difference in approach:

> "The courts, * * * have generally refused to find a violation of § 8(a)(2) where an employer has recognized one of two unions competing for exclusive recognition on the basis of a clear demonstration of majority support * * * The Courts have reasoned that, in extending recognition to a union on such a showing, the employer has not 'coerced or interfered

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* Although the Board phrases the issue as whether a "real question concerning representation" exists, it has not precisely defined the minimum amount of support a rival union must show to raise the question. All that is clear is that the Board requires something less that it normally requires under Section 9(c) (1) of the Act. *NLRB* v. *Playskool Inc., supra.* In *American Bread Co.* 170 NLRB 85, 88 (1968), *enforcement denied,* 411 F.2d 147 (6th Cir., 1969), the Board even intimated that the production of a solitary authorization card by a rival union might be sufficient to raise a question concerning representation within the *Midwest Piping* doctrine even if the rival union never presented a claim that it represents a majority of employees in an appropriate unit.

> with' the minority union, but has merely obeyed the duty imposed upon him to recognize the agent which his employees have designated * * * Thus, many decisions recognize that, however important the need to preserve the integrity of the Board's election machinery, courts must protect the right of employees to select and bargain through their own representative without undue delay. Courts have also sought to implement the congressional purpose of promoting labor peace underlying the National Labor Relations Act, and have accepted a majority showing by the victorious union as a means of terminating the instability inherent in a representation contest and preventing a minority union from frustrating the majority will in order to gain campaigning time * * *" [Citations omitted] 477 F.2d at 70.

It stated the difficulty the Courts have found with the Board's approach as follows:

> "The Board looks first to the support held by the minority union and finds a 'question concerning representation' if the claim of that union is 'not clearly unsupportable'; the courts look first to the support held by the majority union and find that no 'question concerning representation' exists if that union has the validly-obtained support of an employee majority and the rival union is thus shown to be 'no genuine contender.' " (477 F.2d at 70, n.3)

Similar holdings may be found in decisions of almost all of the Circuits: *NLRB* v. *Peter Paul, Inc.*, 467 F.2d 700 (9th Cir., 1972); *Modine Manufacturing Co.* v. *NLRB*, 453 F.2d 292 (8th Cir., 1971); *American Bread Co.* v. *NLRB*, 411 F.2d 147 (6th Cir., 1969); *NLRB* v. *Air Master Corp.*, 339 F.2d 553, 557 (3rd Cir., 1964); *Iowa Beef Packers, Inc.* v.

NLRB, 331 F.2d 176 (8th Cir. 1964); *NLRB* v. *North Electric Co.,* 296 F.2d 137, 139 (6th Cir., 1961); *NLRB* v. *Wheland Co.,* 271 F.2d 122, 124 (6th Cir., 1959); *District 50, UMW* v. *NLRB,* 234 F.2d 565, 570 (4th Cir., 1956); *NLRB* v. *Indianapolis Newspapers,* 210 F.2d 501 (7th Cir., 1954); *NLRB* v. *Corning Glass Works,* 204 F.2d 422 (1st Cir., 1953). See also *NLRB* v. *Swift & Co.,* 294 F.2d 285 (3rd Cir., 1961) where the court rejected the Board's position, stated at 128 NLRB 732 (1960), that the filing of a petition plus an administrative determination of the Board's region to hold a hearing on the petition, without more, was evidence of a real question concerning representation. In fact, "the filing of the petition and a hearing thereon does not in and of itself constitute a reasonable basis for the employer to believe that a real question of representation exists." *NLRB* v. *North Electric Co.,* 296 F.2d 137, 140 (6th Cir. 1961).*

Once indisputable proof of majority choice is presented to the employer, the Act imposes on it a duty to award recognition to the agent so chosen by its employees. *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969); *NLRB* v. *Indianapolis Newspapers Inc.,* 210 F.2d 501 (7th Cir., 1954). The only act made unlawful by Section 8(a)(2) is employer support of a minority union. *I.L.G.W.U.* v. *NLRB, supra.*

Indeed, the Board itself has recognized that the *Midwest Piping* doctrine is inapplicable once the Board has settled the question concerning representation by certifying a union as to the exclusive bargaining representative. *Shea Chemical Corp.,* 121 NLRB 1027 (1958). In *Hunt Brothers Construction, Inc.,* 219 NLRB No. 34 (1975), the union

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* Even the Board has recognized that a rival union's notice of intent to file a petition does not alter the obligation to bargain with the representative of a majority of the employer's employees. *Stant Lithograph, Inc.,* 131 NLRB 7, *enforced,* 297 F.2d 782 (D.C. Cir., 1961); *Boise Cascade Corp.,* 178 NLRB 673 (1969).

sought to bargain for all of the employees covered by the certification but the employer refused contending that there would be some difficulty ascertaining which employees were presently employed at the location subject to the certification. In rejecting the employer's contention that the bargaining obligation had to be postponed the Board said:

> "Our certifications are a conclusive determination of the bargaining unit and may be varied only by us or by mutual agreement of the parties." (Slip Opinion at 3).

"Where a clear majority of the employees . . . have made manifest their desire to be represented by a particular union, there is no factual basis for the contention that the employer's action thereafter in recognizing the union or contracting with it is an interference with their freedom of choice." *Retail Clerks Union, Local 770* v. *NLRB,* 370 F.2d 205, 207, n. 2 (9th Cir., 1966) enforcing *Boy's Market, Inc.,* 156 NLRB 105 (1965).

In the present case the Steelworkers demonstrated their majority status in an appropriate unit through a Board conducted election. The ALA did nothing which could be viewed as raising a real question concerning representation. Based on these two fundamental facts, the *Midwest Piping* doctrine is totally inapplicable to the present case.* Furthermore, it is clear that in this case the Company's rec-

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* The essential inquiries under the *Midwest Piping* doctrine are whether the recognized union represented a majority in an appropriate unit at the time it was recognized and whether this majority was due to any unlawful activity on the part of the employer. *NLRB* v. *Inter-Island Resorts, Ltd.,* 507 F.2d 411 (9th Cir., 1974), *cert. denied sub nom. Hotel, Restaurant Employees and Bartenders Union* v. *Inter-Island Resorts, Ltd.,* — U.S. —, 95 S. Ct. 2657 (1975). Here the task has been simplified because the Board found that the Company did not engage in any independent unfair labor practices or other acts of coercion and the Board-conducted election demonstrated that the Steelworkers had an uncoerced majority in the appropriate unit.

ognition of the Steelworkers was predicated upon the legal command to bargain which was imposed by the Board's certification of the Steelworkers.

If the Company had refused to bargain with Steelworkers for any of the employees covered by the certification during the year following the certification and before the Board's decision herein, it would have violated Section 8(a)(5). See, *Ray Brooks* v. *NLRB*, 348 U.S. 96 (1954), *U.S. Eagle, Inc.*, 202 NLRB 530 (1973), and *Hunt Brothers Construction, Inc.*, 219 NLRB No. 34 (1975). Since the Board has cast this case into a *Midwest Piping* posture, it must be emphasized that the Company did not enter into a contract with a minority union but rather one which the Board had certified as the majority representative, after an election. Signing a contract with a union which represents a majority of the employees in an appropriate unit does not violate Section 8(a)(2) of the Act. *Gaylord Printing Co., Inc.*, 135 NLRB 510 (1962); *NLRB* v. *Hi-Temp, Inc.*, 503 F.2d 583 (7th Cir., 1974).

C. The Board has disregarded the statutory scheme for representation elections and its own *General Extrusion Doctrine*.

While frankly avowing its continued adherence to the expansive view of *Midwest Piping* generally rejected by the Courts, the Board seeks to circumvent the consistent judicial disapproval of its ever expanding *Midwest Piping* doctrine by arguing that ALA raised a real question concerning representation on the basis of (1) ALA's history of bargaining for lithographic production employees in a separate unit at the Hudson plant which was to be closed; (2) the transfer of part of the operations at the Hudson plant to the Regency plant, including some of the lithographic production work; (3) the transfer of some of the lithographic equipment from the Hudson plant to the Re-

gency plant; (4) the expected offer of employment at the Regency plant to some of the lithographers employed at the Hudson plant; and (5) the ALA's purported claim to represent lithographic production employees at the Regency plant. (Bd. Dec., 6a-7a)

In constructing this analysis, the Board disregards the whole scheme of the statute dealing with representation questions. Established Board procedures—and the statute—require that if the ALA wished to represent employees in a purported craft unit at Regency, it had to obtain representation cards from 30% of those craft members employed at Regency and file a timely petition for representation.* The ALA would thus have to show support of employees at the Regency plant—something it has never done in this proceeding. *Mrs. Tucker's Products,* 106 NLRB 533, *amended* 106 NLRB 1243 (1953).

What the Board has done in the instant case is to expand its *Midwest Piping* theory to the point of permitting a union to merely say it *wishes* to represent employees in a unit when they are hired and have those employees excluded from the overall production and maintenance unit without requiring a showing of interest or any investigation as to their unit placement.

By so holding, not only has the Board misapplied the *Midwest Piping* doctrine, but, as we have suggested above,

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* Section 11022.3(d) of the Board's Field Manual provides that an intervenor may participate in a pending representation proceeding without making a showing of interest. But if the intervenor does not have at least a 10 percent showing of interest it may not block a consent election agreement in the petitioned-for unit. While Section 9(c) of the Act precludes a challenge by a rival petitioner for one year after the certification; thereafter a timely petitioner may litigate (in either a contract bar or craft severance context depending on the timing of the petition) whether the voting group was representative and substantial. See *General Extrusion, supra.*

it has at the same time totally ignored its *General Extrusion** test which establishes the basic guidelines for the running of a representation election when a new plant is opening.

In such an expanding unit situation, established Board policy favors an immediate election of a bargaining representative for the entire unit even though many of the employees who will be represented are not yet hired. The Board has long held that it will direct an election if the present employees constitute a substantial and representative segment of the ultimate work force. See *NLRB* v. *Clement-Blythe Co.*, 415 F.2d 78 (4th Cir., 1969); *General Cable Corp.*, 173 NLRB 251 (1968). As noted above, the Board deems the complement to be substantial if 30% of the expected employees have been hired. The complement is deemed representative of the projected work force if 50% of the expected job classifications have been filled. *General Extrusion Company, Inc., supra; Firestone Synthetic Fibers Co.*, 171 NLRB 1121 (1968)**.

The Board ordinarily directs—as it did here—an immediate election in the presumptively appropriate unit of "all production and maintenance" employees, excluding office

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* *General Extrusion*, 121 NLRB 1165 (1958), seems to be one of those cases like *Excelsior Underwear*, 156 NLRB 1236 (1966) in which the Board has used a pending adjudicatory proceeding to formulate administrative policy. Thus, a retroactive displacement of such a policy, particularly in an unfair labor practice setting, raises the special problems of fairness and notice associated with such an adjudicatory rule making process.

** While the *General Extrusion* test guides the Board's decisions in this area, the Board will sometimes direct an election even if the complement has not met the 30%-50% test. *Endicott Johnson de Puerto Rico*, 172 NLRB 1676 (1968). In addition to this exception to *General Extrusion*, the Board places the burden of proof on the party opposing the election to show that the present complement is insubstantial and unrepresentative. *Jim Dandy Fast Foods, Inc.*, 182 NLRB 269 (1970); *Kellogg Switchboard & Supply Co.*, 127 NLRB 64 (1960).

clerical, professional, and technical employees, and guards and supervisors within the meaning of the Act,* even though such a unit may include craftsmen. As the Administrative Law Judge noted, such a unit is an appropriate one for collective bargaining although a craft unit might also be appropriate (ALJD, 38a[1]).

While the Board claims that if in the instant case it had been told of ALA's interest and claim (as the Region undisputably was), no election would have been held until it resolved the unit placement of the lithographers,** it offers that conclusion without authoritative citation and without explanation of how it would propose to conduct a representation hearing in a situation where there were no employees employed and the union has not made a showing of interest with appropriate authorization cards.

The Board totally ignored the Administrative Law Judge's conclusions in this regard:

> "I also note that Regency employed a representative complement of employees, as measured by its satisfying the *General Extrusion* case standards when Steelworkers was certified for a production and

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* *See*, e.g., *Frolic Footwear, Inc.*, 180 NLRB 188 (1969); *Key Research & Development Co.*, 176 NLRB 134 (1969); *Redman Industries, Inc.*, 174 NLRB 1065 (1969); *American Type Founders Co., Inc.*, 173 NLRB 707 (1968).

** While the Board's decision states that it would have withheld the Steelworkers' certification, the Board fails to cite any precedent for such an alteration of the statutory scheme. Congress gave to a union selected by a majority in an appropriate unit the right to obtain recognition for the entire unit including a non-consenting minority. *ILGWU* v. *NLRB, supra; NLRB* v. *Appleton Electric Co.*, 296 F.2d 202 (7th Cir., 1961), denying enforcement of 127 NLRB 150; *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956). To exclude non-consenting minorities from an appropriate unit before a question concerning their representation is raised is to refashion the statutory scheme. *NLRB* v. *Kiekhaefer*, 292 F.2d 130 (7th Cir., 1961).

> maintenance unit. Although lithographic production employees were separately represented at Hudson, and could properly have been so represented at Regency, there is no Board policy against the inclusion of such workers in a production and maintenance unit. I therefore find that once lithographic employees were hired at Regency they were properly added to the overall production and maintenance unit as an accretion." (ALJD, 37a[46])

The Board fails to even acknowledge this finding, much less to address its substance.

The reason for the Board's silence in this regard is readily explicable; its present conclusions are utterly at variance with prior Board precedent. *Mrs. Tucker's Products,* 106 NLRB 533 *amended,* 106 NLRB 1243 (1953), is a case factually indistinguishable from the present one. There rival unions petitioned to represent the production and maintenance employees at a time when no carpenters were employed. Although the Board concluded that an election in the larger unit had to be delayed for a few weeks until a representative number of employees were employed, it denied the carpenters union's motion to intervene because the union could not submit any showing of interest. Even though carpentry is a traditional craft, the Board held that it would not act on an anticipatory claim by the carpenters' union and resolve unit replacement prior to employees being hired. While lithographers might be entitled to separate representation or a self-determination election in some circumstances, *e.g., Mallinckrodt Chemical Works,* 162 NLRB 387 (1966), *General Box Co.,* 82 NLRB 678 (1949), a lithographic production unit could not be found to be an appropriate unit absent any lithographic production employees. Even if a separate unit might be found appropriate, the

comprehensive production and maintenance unit at a manufacturing plant is still an appropriate unit for purposes of collective bargaining and the Company was mandatorily obligated to bargain with Steelworkers following their certification for that unit. *International Paper Co.*, 171 NLRB 526 (1968); *Solar Manufacturing Co.*, 110 NLRB 1188 (1954); *Firestone Synthetic Fibers Co., supra.*

What the Board has done without discussion in its present decision is to hold that if one of the unfilled job classifications under the *General Extrusion* test is a craft group, then any election conducted in the overall unit pursuant to *General Extrusion* must exclude the craft group from the appropriate unit even if there are no present craft employees. Never before has the Board read such an exception into its *General Extrusion* doctrine.

While the Board has not said so, it seems likely that it felt driven to this result because it was perturbed that the normal functioning of its *Midwest Piping* and *General Extrusion* doctrines was precluding a craft group from gaining separate representation during the term of the existing collective bargaining agreement between the Company and the Steelworkers.** The only grounds upon which the Board could properly have avoided this result without doing complete violence to its *Midwest Piping* and *General Extrusion* doctrines was to find that the Company and

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* Board precedent is clear that a petition must be filed before the Board will consider the issue of unit placement. Thus in *International Paper Co.*, 171 NLRB 526, 530, n. 16 (1968). The Board refused a separate craft election, despite the presence of a substantial number of craftsmen, because no petition had been filed.

** ALA can petition for craft severance between 60 and 90 days prior to a contract's expiration if it can muster sufficient support from craft employees (30%) to meet the Board's rules.

Steelworkers had engaged in some kind of collusion or fraud. The General Counsel never even argued that the parties were involved in collusion to obtain a desired result and never offered any evidence on either theory. As we discuss more fully below, the Board cannot muster any record support for such a claim.

Thus, the Board was compelled to distort *General Extrusion* and erode the precepts of *Midwest Piping*. The Board is trying to rely upon the history of bargaining at the defunct plant, the transfer of a small part of the operation to the new plant, the transfer of some equipment, the expected offer—never accepted—of employment to 5 people from Regency as part of a planned complement of 30, and a naked claim of representation proffered by the ALA. What is essentially and fundamentally wrong with such a rationale is that it presupposes a labor law theory which creates—so to speak—a covenant of union representation which runs with a piece of equipment or a product line. No such theory exists. See *McLeod* v. *National Maritime Union,* 334 F. Supp. 34 (S.D.N.Y. 1971), *aff'd,* 457 F.2d 490 (2d Cir., 1972).

In essence, the Board has found "a real question concerning representation" to exist solely on the ALA's expressed *desire* to represent any lithographers that the Regency plant might hire in the *future* and in the ALA's past history of representing lithographers at the Hudson plant. This, the Board concluded, was somehow sufficient to raise a real question concerning representation at Regency in September, 1973. But the Board found that the Regency plant did not hire its first lithographic production employee until December, 1973 and that lithographic production operations did not begin at the Regency plant until February, 1974; these findings establish that there was no real question concerning representation when in

September 1973 the Board conducted its election or when in October 1973 the Company entered the collective bargaining agreement with the Steelworkers, which form the basis of the Board's present decision that the Company violated Sections 8(a)(1), (2) and (3).

To support its position here, the Board relies (Bd. Dec., 7a) incorrectly on *NLRB* v. *Hudson Berlind Corp.*, 494 F.2d 1200 (2d Cir.), *cert. denied,* 419 U.S. 897 (1974). In that case the employer consolidated two separate operations into a single entity, merged two independently viable units (with two different unions) into one and then took it upon itself to select one of the unions to represent all of the employees. In affirming the Board's order, this Court found that one union's numerical superiority was not sufficiently predominant to remove any real question concerning representation or to justify the Employers' preemption of the employees' statutory right to choose. Obviously, no such situation is presented here. Here, not the employer, but the employees, selected the bargaining representative, by an overwhelming vote, in an election conducted by the Board under well-established precedent.

Based on the foregoing, it is clear that the Board has not invoked the *Midwest Piping* doctrine as it has been approved by this or any other Court. Rather, the Board has put the ALA into a position it could not get itself into without a showing which it has not even yet made—that it had some legitimate support from employees employed at the Regency plant.

POINT II

There Is No Substantial Evidence Supporting The Board's Conclusion That The Company Withheld Information From The Regional Office.

The Board found, contrary to the Administrative Law Judge, that the Company withheld from the regional office personnel vital information concerning the ALA's interest in representing lithographers. The Board cites no testimony in support of this conclusion and the record contains none. While the Administrative Law Judge found that the Company did not inform the Regional Office that ALA was asserting that it should be recognized as the representative for all lithographic employees "who would eventually be hired at Regency . . ." (ALJD, 36a[32]), he further found that:

> ". . . a Company official, Ries, did tell Board agent Schectman, when she asked him if he knew of any ALA interest at Regency, that she could call Company headquarters where Cooper, the Company official who had signed the Stipulation [a consent election stipulation] was located. Schectman apparently was satisfied that ALA had no supportable claim to participate in the election because there were no lithographic workers then employed at Regency." (ALJD, 36a[33])

Based on that conclusion of the trier of the facts, and the lack of any record testimony as to whether Schectman actually called Cooper (which was noted by the Administrative Law Judge at 22a[14]), the Board committed prejudicial and reversible error by concluding that the Company withheld vital information. Cf. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951).

More importantly, the Administrative Law Judge found as a matter of fact that the Regional Office did in fact know of a possible claim by ALA. As the Judge noted:

> "Moreover, it is clear that the Regional Office had been alerted to a possible representation claim by ALA at Regency, when it filed its opposition to holding the election in its letter of September 20, and in its charge of a Section 8(a) (2) violation, filed after the election but before certification of the Steelworkers. If there was negligence on the part of the Regional Office, although I make no such finding, there is no more reason to penalize the Steelworkers and the Company, who acted pursuant to the certification, than the ALA." ALJD, 37a[12])

This finding was ignored by the Board in its decision.

Even assuming *arguendo* that such information was withheld, that fact would not support a finding that the employees were coerced in their decision. Since there were in fact no pressmen employed at Regency on the date of the election, participation by the ALA was not permissible under the Board's rules. Further, the ALA for its own reasons did not choose to even attempt to intervene in the proceedings and has never demonstrated any showing of interest in an appropriate unit. Moreover, the Board itself, in other American Can cases, has certified production and maintenance units including lithographers at the Atlanta Plant, Fairport, N. Y. Plant, Needham, Mass. Plant (represented by International Association of Machinists), and the Morrisville, Penn. Plant, Tampa, Florida Plant, Indianapolis, Indiana Plant, Hammond, Indiana Plant, Puerto Rico Plant (represented by the United Steelworkers of America).

The Board tries to bolster its argument that there was some sort of deception by making a finding that at the time the parties entered into the Stipulation Upon Consent Election, the term "including lithographers", which was in the original Representation Petition, was omitted "at the suggestion of a Board representative on the assurance of Respondent that no lithographic employees were then employed at the new plant." (Bd. Dec., 4a) This assertion is totally without support in the record; no one testified at the hearing who was privy to the discussions leading up to the signing of the Stipulation.

Contrary to the picture that the Board is groping to paint, the ALA was certainly sophisticated enough to insure that it took steps to keep an eye on developments at both the old and the new plant, and to that end Allen Olmstead, Director of Organizing and Financial Secretary, was assigned to keep in touch with the Hudson Shop Steward and to alert the ALA's attorney of what was happening so he could take necessary action (Tr., 103a). The record evidence is clear that the ALA made a conscious decision to take no action vis-a-vis the NLRB until the day before the election. In his testimony, the Shop Steward, Campione, recounted that in his conversation with Olmstead the day before the election, he told Olmstead "Let's not wait any more." (Tr., 312a) When questioned further about that statement, Campione said that he didn't think that he "had any right to press the Company" at any earlier time about Regency (Tr., 315a), thus showing he was aware of the Regency developments at an earlier point in time. Inasmuch as Olmstead was assigned to keep in touch with Campione, it is implausible to believe that Campione was not telling Olmstead all that was going on. Moreover, Campione's admonition to Olmstead that they shouldn't wait any more strongly suggests

that they intentionally took no action until the day before the election.

The Board, in its decision, relies on *U.S. Chaircraft, Inc.*, 132 NLRB 922 (1961), as controlling authority for its proposition that the Company withheld vital information from the Board representatives processing the representation petition and thus tainted the election. But that case is inapplicable to the instant case inasmuch as the employer there admitted that it had, in the representation proceeding, perpetrated a fraud on the Board and *purposely* refrained from disclosing that a rival union had made a demand for recognition as the bargaining agent for the employees in an appropriate unit. As noted previously, the ALA never made such a demand for recognition in an appropriate unit, and never even claimed to represent any employees then employed by the Company at Regency; moreover, there is no evidence what the employer did or refrained from doing with respect to disclosure to the Board. Surely, this record is utterly devoid of evidence that the election was tainted by fraud or unfair dealing, and the Administrative Law Judge's findings on the evidence are squarely contrary.

Conclusion

The instant case is simply not a *Midwest Piping* case, as the Administrative Law Judge recognized. The *Midwest Piping* doctrine is not applicable because at the time the Steelworkers filed their petition for representation, and at the time the NLRB conducted the election:

1. There were no lithographers employed by American Can at the Regency plant;

2. Accordingly, the ALA had not and could not claim that it represented any employee of American Can at its Regency plant;

3. The ALA did not try to intervene in the NLRB representation proceeding;

4. The ALA could not have successfully intervened in the NLRB representation proceeding because it could not make a "showing of interest"—it could not show the Board a single representation card evidencing the fact that one single employee at the Regency Plan wanted the ALA to represent him;

5. The Board has no available administrative proceeding which would permit a union to litigate the unit placement of employees not yet employed; and

6. The Board's *General Extrusion* test—a test requiring a minimum number of employees to have been hired by a new plant, and a minimum number of job titles to be filled in the new plant—was completely satisfied and thus the Board was obligated to conduct an election.

Under these circumstances, the Company's recognizing and contracting with the Steelworkers on the basis of the election result and the Board certification was not an unfair labor practice violative of Section 8(a)(2) but rather was the carrying out of an obligation imposed upon the Company by Section 8(d). Since the Section 8(a)(2) charge falls, the remaining charges—of unlawful assistance (Section 8(a)(1)) and the discrimination (Section 8(a)(3)), which are predicated upon the alleged Section 8(a)(2) violation, must fall as well. For the same reason, the Board's attempt to amend the Steelworker certification retroactively must fall.

We respectfully submit that this Court should set aside the order of the National Labor Relations Board insofar

as it found that American Can Company had violated Sections 8(a)(1), 8(a)(2) and 8(a)(3) of the Act and directed that its certification be amended, on the ground that such determinations are not based upon substantive evidence or in accordance with applicable law.

Respectfully submitted,

SIMPSON THACHER & BARTLETT
Attorneys for Petitioner
American Can Company
Office and P. O. Address
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

ALBERT X. BADER, JR.
MARTIN H. ZUCKERMAN
JAMES S. FRANK,
Of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARIE MULHALL , being duly sworn, deposes and says:

I am over the age of eighteen (18) years and am not a party to this action.

On the 29th day of January , 1976, I served a copy of the annexed paper upon General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, Washington, D.C. 20570; David L. Gore, Esq., Bernard Kleinman, Esq., United Steelworkers of America AFL-CIO, Five Gateway Center, Pittsburgh, Pennsylvania 15222; Robinson, Silverman, Pearce, Aronsohn, Sand & Berman, 230 Park Avenue, New York, New York 10017

by depositing a true copy of the same in a properly addressed postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City, County and State of New York.

Marie Mulhall

Sworn to before me this
29th day of January , 1976.

Kathleen E. Schaaf

KATHLEEN E. SCHAAF
Notary Public, State of New York
Qualified in [illegible] County
Commission Expires March 30, 1976